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SUPREME COURT, U. S.

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No. 1093

Supreme Court of the United States

OCTOBER TERM, 1965

LEE E. A. PARKER, *Petitioner,*

v.

CLARENCE T. GLADDEN, Warden of Oregon State Penitentiary, *Respondent.*

REPLY BRIEF FOR PETITIONER

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By referring to Art. I, Sec. 11 of the Oregon Constitution, which allows ten members of the jury to render a guilty verdict, respondent seeks to avoid the holding of *Turner* v. *Louisiana,* 379 U.S. 466 (1965), that prejudice need not be shown to void a conviction for misconduct of the sort involved here.

Respondent can see no difference between a jury two of whose members have been subjected to outside influence and a jury two of whose members simply disagree with the verdict. This view plainly has nothing to do with the realities of how twelve people interact to reach a verdict—a conclusion reinforced by

the fact that the jury in this case deliberated for 26 hours. Under these circumstances "it would be blinking reality not to recognize the extreme prejudice" resulting from the misconduct of the bailiff. See *Turner* v. *Louisiana,* 379 U.S. at 473.

The precise situation arose in *State* v. *Murray,* 164 La. 883, 114 So. 721 (1927), where a conviction was reversed because of outside influence exerted on two jurors to convict. The court disposed of the same contention advanced here with these words:

> "It is argued that no harm was done by the deputies in this case, because nine of the jurors testified that the deputies did not attempt to influence their judgment, and because at least ten, and more likely eleven, of the jurors voted to convict the defendant, when the concurrence of only nine was enough to convict. There is some logic in the argument, but it overlooks the fact that, notwithstanding the defendant could be legally convicted by the unfavorable vote of nine as well as of twelve jurors, he was entitled to be tried by twelve—not nine or ten or eleven, but twelve—impartial and unprejudiced jurors." (114 So. at 723).

The same rule has been followed in civil cases not requiring unanimous jury verdicts, *Piehler* v. *Kansas City Public Service Co,* 357 Mo. 866, 211 S.W. 2d 459 (1948) (participation of one biased juror voids unanimous verdict, even though three-fourths verdict authorized), and in cases involving administrative agencies. *Texaco, Inc.* v. *Federal Trade Comm.* 118 U.S. App. D.C. 366, 336 F. 2d 754 (1964) (participation of biased Commissioner amounts to denial of due process); *Piggott* v. *Borough of Hopewell,* 22 N.J. Super. 106, 91 A. 2d 667 (1952) (zoning board); *Daly* v. *Town Plan*

& Zoning Comm., 150 Conn. 495, 191 A. 2d 250 (1963) (zoning board).

Respondent's makeweight argument cannot support a conviction and sentence of life imprisoment based on the blatant misconduct established in this case.

Respectfully submitted,

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